REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1930 OF 2008

CHRISOMAR CORPORATION …APPELLANT

VERSUS

MJR STEELS PRIVATE LIMITED & ANR. ...RESPONDENT

J U D G M E N T

R.F. Nariman, J.

1. The present appeal raises several interesting questions which arise in admiralty law. The vessel, M.V. Nikolaos-S, was owned by one Third Element Enterprises, a Cyprus company, and was flying the flag of the Republic of Cyprus. The plaintiff in the admiralty suit, who is the appellant before us, supplied bunkers and other necessaries to the said vessel at the port of Durban on terms and conditions agreed between the parties in November, 1999. According to the plaintiff, the bunkers were

received by the master of the vessel and services were rendered to the vessel as acknowledged by the master. The plaintiff raised invoices on 26.11.1999 for US$ 94,611.25 which have not yet been paid.

2. When the vessel docked in the port of Haldia, the plaintiff filed admiralty suit No.1 of 2000 in the Calcutta High Court praying for an arrest of the vessel because, according to the plaintiff, the necessaries supplied to the vessel would not only amount to a maritime claim but would also be a maritime lien on the vessel. By an order dated 6.1.2000, the vessel was so arrested but nobody came forward for release of the vessel at that point of time. It is only on 25.1.2000 that learned counsel appearing on behalf of the plaintiff approached the learned admiralty Judge expressing the plaintiff's intention not to proceed with the application for arrest as, according to him, the parties had reached an out of court settlement. The order passed on 25.1.2000 reads as follows:-

> "The Court by an order dated January 6, 2000 directed that the vessel known as M.V.Nikolaos – S was to be arrested. On the returnable date no one appeared on behalf of the respondents. The

directions for affidavits had been given on January 10, 2000. Today when the matter was called on for hearing, counsel appearing for the petitioner submitted that an out of court settlement has been reached between the parties and the petitioner was not inclined to proceed with the matter any further. For these reasons, this application is dismissed for non prosecution.

All interim orders are vacated.

The vessel shall cease to be under arrest as of now."

3. It is important at this stage to advert to the agreement that was entered into on 18.1.2000. Since both sides have argued extensively on the aforesaid agreement, it is necessary to set it out completely. The said agreement reads as follows:-

"AGREEMENT GUARANTEE

In Piraeus and at the offices of "LALLIS OUTSINOS ANAGNOSTOPOULOS" Lawyers Maritime Consultants of 100, Kololotroni Street, Piraeus, this Tuesday the 18th January 2000, by and between:

A. CHRISOMAR CORPORATION, a company duly established and operating under the laws of Liberia, maintaining an office in Greece (5 Solomou Str. Kifissia) (hereinafter called Chrisomar), duly represented, for the purpose of this agreement by its authorized lawyer Mr. Dimitrios Voutsinos,

B. THIRD ELEMENT ENTERPRISES LTD, a company duly established and operating under the laws of Cyprus (hereinafter called “THE SHIPOWNERS”), duly represented for the purpose of this agreement by the President of the Board of Directors, Mr. Sotirios Soulkas, who also declared that he has the necessary authorization and capacity to bind the company to this agreement by his sole signature.

C. Sotirios Soukas, of 145 Filonos Str, Piraeus, the following were stated and agreed.

WHEREAS

1. The shipowners are the legal owners of the Cyprus flag vessel Nikolaos S, Int. Sign: P 3 KT 6 (“the vessel”) managed in Greece by Suter Shipping and Trading Ltd.

2. Chrisomar has sold and delivered to the vessel in the port of Durban a certain quantity of bunkers, on or about 26th November, 1999, Chrisomar has issued its invoice no. 99232/15.12.1999 for the amount of USD 94,611.25, payable on 26th November, 1999 (Copy of the invoice is attached herewith as app. I).

3. The owners have failed to pay the amount of the above invoice by the 26th November 1999 and consequently, Chrisomar arrested the vessel in the port of Haldia, India for security of the above claim.

THE PARTIES AGREE AS FOLLOWS

1. The shipowners hereby confirm that they owe to Chrisomar USD 104,688.60, analysed as follows: USD 94,611.25 for the invoice amount + USD 2,177.35 for interest accrued + USD 7,900.00 for legal costs.

2. The shipowners, through their President Mr. Sotirios Soukas, represent to Chrisomar that (a) their vessel is

due to be chartered out for a voyage from Bangkok, Thailand to ports of West Africa as against a freight of about USD 35.00 per metric ton of cargo; (b) that if Chrisomar releases their vessel from the above arrest shall be able to proceed to Bangkok for loading and to perform the intended charter voyage; (c) that the shipowners as soon as their vessel is released from its arrest by Chrisomar shall include in their recap and charter party with the intended charterers of their vessel a clause that part of the freight amounting to USD 104,668.60 shall be paid directly by the charterers to Chrisomar's bank account as follows:

ANZ GRINDLAYS BANK

21, Akti Miaouli, 18535 Piraeus

Swift: GRNDGRAA,

A/C No. 815142 USD 40632

In favour of Chrisomar Corp.

3. The above recap shall be faxed by the shipowners to Chrisomar one (1) working day after its conclusion.

4. The shipowners will not sell their vessel prior to the satisfaction of Chrisomar's above claim and shall provide Chrisomar with a report by fax of the movements of their vessel every five (5) days.

5. The above payment shall be made in full and final settlement of Chrisomar's above claim per capital and costs.

6. If, for any reason the above amount is not paid to Chrisomar within ten (10) working days after the ships sailing from the port of loading Bangkok or, the shipowners are in breach of any of the representations and obligations set out in paras 2, 3 and 4 above then Chrisomar will be entitled to take all the appropriate legal

steps including the arrest of the vessel for recovering the above amount or any higher one which they may be entitled to.

7. Sotirios Soukas hereby guarantees to Chrisomar and in favour of the shipowner the due payment of the above amount, working the right of division and exclusion i.e. he admits that he will pay amounts due to Chrisomar without the latter having first to enforce its claim against the shipowners and their vessel.

8. If the vessel is lost, for any reason or if the mortgagee bank or any other claimant arrests the vessel before reaching Bangkok and as a result, the shipowners are unable to proceed for loading to Bangkok, and thus execute the above stated charter voyage, the above obligations of the guarantor shall cease to exist but Chrisomar will maintain its rights of recovery only against the shipowners and the vessel but not against the guarantor.

9. This agreement is subject to Greek law and the exclusive jurisdiction of the Piraeus Courts. ”

4. It appears that nothing in the meanwhile happened. At no point of time did the vessel sail for the port of Bangkok – it remained continuously in Haldia. It is only on 2.5.2000 that the vessel was re-arrested. The Court recorded that no payment had yet been made and that the claim of the plaintiff continued to remain unsatisfied. It is this re-arrest that is the bone of contention between the parties in the present matter.

5. A written statement was filed on behalf of respondent no.1, MJR Steels, an Indian company who allegedly purchased the vessel from one Fairsteel Corporation, Singapore. Apparently, an agreement was entered into between Fairsteel and respondent no.1 on 21.1.2000. The written statement filed by respondent no. 1 alleged:

> "The said vessel was originally owned by The Third Element Enterprises Shipping Ltd. Third Element Enterprises Shipping Ltd. sold and transferred the said vessel to Eastern Wealth Investment Ltd. Eastern Wealth Investment Ltd. sold and transferred the said vessel to Fairsteel Corporation. Fairsteel Corporation sold and transferred the said vessel to this defendant. This defendant acquired the right, title or interest in respect of the said vessel from the said Fairsteel Corporation."

6. The learned single Judge by his judgment and order dated 28.4.2005 listed as many as seven issues and adverted to the fact that three witnesses were called on behalf of the plaintiffs, who not only deposed and were cross-examined, but also produced various documents. The defendants, however, did not produce any witness but tendered as their evidence six exhibits which were produced only through the plaintiff's

witnesses.

7. According to the learned single Judge, the order of 25.1.2000 made it clear that suit No.1 of 2000 was kept alive and remained alive on the date of the re-arrest, namely, 2.5.2000. All that was done by the order dated 2.5.2000 was to recall the order dated 25.1.2000, and when that was done, the original order of arrest was automatically revived. This being the case, it is clear that the plaintiffs were entitled to recover their dues. The learned single Judge further went on to hold that respondent no.1's claim that ownership had changed and that they had become owners of the vessel in April, 2000, was not conclusively proved. The single Judge referred, among other documents, to a suit filed by respondent no.1 against Fairsteel Corporation on 9.5.2000 in which respondent no.1 prayed for a decree for rescission of the agreement for sale dated 21.1.2000, as also for cancellation of the said agreement, and perpetual injunction restraining Fairsteel from claiming any money under the Letter of Credit furnished by respondent no.1. It recorded that the said suit was dismissed for non-prosecution

on 12.10.2004, and from the averments made in the said suit, it was clear that there was no concluded sale in favour of respondent no.1.

8. An appeal to the Division Bench by respondent no.1 however succeeded. By the impugned judgment dated 13.9.2006, it was held that the plaintiff's first witness admitted the fact that the vessel's ownership changed hands and that on the date of re-arrest, i.e. 2.5.2000, it was respondent no.1 who was the owner. It also examined various documents to arrive at the conclusion that the vessel physically changed hands on 15.4.2000 and payments under the Letter of Credit were made pursuant to the agreement dated 21.1.2000 on 26.4.2000. The Division Bench further went on to hold that though the allegation as regards the successive transfers of title had not been proved by the defendant, the said fact would make no difference. It also went on to hold that there could be a good title by estoppel. The Division Bench further went on to apply Section 62 of the Indian Contract Act, 1872 to the out of court settlement dated 18.1.2000 and stated that as there was a

novatio of the original agreement in law, the original cause of action pleaded in admiralty Suit No. 1 of 2000 no longer subsisted. Therefore, the claim made in the suit was held to have been abandoned when the settlement dated 18.1.2000 was acted upon. In this view of the case, the Division Bench reversed the single Judge's decision and held that the suit was liable to be dismissed on all these grounds.

9. Shri Shyam Divan, learned senior counsel appearing on behalf of the appellants, has argued before us that the agreement dated 18.1.2000 would not amount to a novatio of the original agreement. According to him, the original agreement continued and was in fact enforced by the second order of arrest dated 2.5.2000. According to him, the right that was vested in the appellant on 5.1.2000, i.e. the date of the institution of the suit, is alone material, and it is on that date, and not the date of arrest on 2.5.2000, that the ownership of the vessel has to be seen. For this purpose, he cited certain English precedents. He also cited an American judgment to buttress his submission that the present was a case not merely

of a maritime claim but also of a maritime lien in that necessaries supplied to the vessel would amount to a maritime lien. According to him, in any event, on facts, the Division Bench was completely wrong in arriving at a conclusion that there was a concluded sale in April, 2000 in favour of respondent no.1 inasmuch as several documents produced by the plaintiff's witnesses would show that no such sale had, in fact, taken place.

10. Shri Banerjee, learned senior counsel appearing on behalf of the respondents, has countered each of these submissions. According to Shri Banerjee, the Division Bench is absolutely correct. The present is the case of enforcement of a maritime claim, but there is no maritime lien in law for necessaries supplied to the vessel. This being the case, it is important to know who the owner of the vessel is on the date of arrest, i.e. on 2.5.2000. If the owner is respondent no.1, then a claim for necessaries against the original owner, Third Element, on the date of institution of the suit would not lie against the respondent on the date of arrest. According to learned counsel,

English authorities cited by Shri Divan would not apply to the present case as in England there is a completely different procedure for arresting a vessel. A writ of summons is issued under Order 53 of the U.K. Civil Procedure Code for service outside the jurisdiction of the court which is kept alive for a period of six months. Further, according to learned counsel, Section 62 of the Contract Act is squarely attracted inasmuch as the settlement dated 18.1.2000 completely replaced the original agreement as a result of which the original cause of action pleaded in the suit has disappeared. Learned counsel also painstakingly took us through various documents to show that the sale of the vessel to respondent no.1 had indeed taken place in April, 2000 and that, therefore, on the date of arrest, i.e. 2.5.2000, since his client was the owner of the vessel, the amounts could not be recovered from respondent no.1.

11. Admiralty law in England, as was held by Lord Halsbury in **Currie** v. **M'Knight** 1897 AC 97, is derived from the laws of Oleron[1] and other ancient maritime codes like the Rhodian Sea

1 The rolls of Oleron are associated with the island of Oleron, off the coast of Western France, which was the site of an ancient maritime court associated with a seaman's guild of the Atlantic. In England, they were promulgated by Eleanor of Aquitaine, wife of Henry II, as vice-regent for her son King Richard I, while the latter was fighting the Saracens

Law, the Basilika, the Assizes of Jerusalem, the Baltic Laws of Wisbuy and the Hanseatic Code. In England, the common law courts could not give effective redress to cases which arose in admiralty, which were then left to the jurisdiction of specialist admiralty Judges. By the 18th Century, the admiralty jurisdiction had fallen into "a feeble and neglected condition, and for long its proceedings excited no attention" [2]. The Admiralty Court Act, 1840 was the first of a series of statutes extending and defining the jurisdiction of the High Court of Admiralty in England. This was followed by the 1861 Admiralty Court Act and various subsequent enactments which were consolidated by the Supreme Court of Judicature (Consolidation) Act, 1925. By the Administration of Justice Act of 1956, the admiralty jurisdiction of the High Court was further widened and the Supreme Court Act of 1981 now defines what the admiralty jurisdiction of the High Court in England is.

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on the Third Crusade. King Henry VIII later published these rolls as, "The judgment of the sea, of Masters, of Mariners and Merchants, and all their doings". They are expressly included in the compilation of English admiralty law, the "Black Book of the Admiralty".

2 See, Roscoe's Admiralty Practice, 5th edn. at Pg. 14.

12. Insofar as our law is concerned, the admiralty law of the chartered High Courts has historically been traced to the charters of 1774 and 1798 as subsequently extended and clarified by the Letters Patents of 1823, 1862 and 1865. The Admiralty Court Act, 1840 and 1861, and the Colonial Courts of Admiralty Act, 1890 and 1891 essentially stated what the admiralty law in this country is, and these enactments continued as existing laws under Article 372 of the Constitution of India. Some of the relevant provisions of these Acts are set out hereinbelow:-

> "**Admiralty Court Act, 1840**
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> 6. *The court in certain cases may adjudicate, etc.*— The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or seagoing vessel or in the nature of towage, or for necessaries supplied to any foreign ship or seagoing vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a country, or upon the high seas, at the time when the services were rendered or damage received, or necessaries furnished, in respect of which such claim is made.
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> **Admiralty Court Act, 1861**

5. *As to claims for necessaries*.—The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales:

Provided always, that if in any such cause the plaintiff do not recover twenty pounds, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said Court.

Colonial Courts of Admiralty Act, 1890

2. *Colonial Courts of Admiralty*.—(1) Every court of law in a British possession, which is for the time being declared in pursuance of this Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction, exercise all the powers which it possesses for the purpose of its other civil jurisdiction and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. …

(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise and the Colonial Court of Admiralty may

exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

Colonial Courts of Admiralty (India) Act, 1891

2. *Appointment of Colonial Courts of Admiralty*.— The following courts of unlimited civil jurisdiction are hereby declared to be Colonial Courts of Admiralty, namely:

(*1*) the High Court of Judicature at Fort William in Bengal,

(*2*) the High Court of Judicature at Madras, and

(*3*) the High Court of Judicature at Bombay."

13. The Republic of India has finally woken up to the need for updating its admiralty law. The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 has been made by Parliament and has received the assent of the President on 9.8.2017, though it has not yet been brought into force. In this Act, "maritime claim" is defined in Section 2(1)(f) as being a claim referred to in Section 4 and a "maritime lien" is defined in sub-section (g) of 2(1) as follows:

"2. **Definitions**

(1) In this Act,—

(g) “maritime lien” means a maritime claim against the owner, demise charterer, manager or operator of the vessel referred to in clauses (a) to (e) of sub-section (1) of section 9, which shall continue to exist under sub-section (2) of that section;”

Section 4 reads as follows:

“4. **Maritime Claim**

(1) The High Court may exercise jurisdiction to hear and determine any question on a maritime claim, against any vessel, arising out of any—

(a) dispute regarding the possession or ownership of a vessel or the ownership of any share therein;

(b) dispute between the co-owners of a vessel as to the employment or earnings of the vessel;

(c) mortgage or a charge of the same nature on a vessel;

(d) loss or damage caused by the operation of a vessel;

(e) loss of life or personal injury occurring whether on land or on water, in direct connection with the operation of a vessel;

(f) loss or damage to or in connection with any goods;

(g) agreement relating to the carriage of goods or passengers on board a vessel, whether contained in a charter party or otherwise;

(h) agreement relating to the use or hire of the vessel, whether contained in a charter party or otherwise;

(i) salvage services, including, if applicable, special compensation relating to salvage services in

respect of a vessel which by itself or its cargo threatens damage to the environment;

(j) towage;

(k) pilotage;

(l) goods, materials, perishable or non-perishable provisions, bunker fuel, equipment (including containers), supplied or services rendered to the vessel for its operation, management, preservation or maintenance including any fee payable or leviable;

(m) construction, reconstruction, repair, converting or equipping of the vessel;

(n) dues in connection with any port, harbour, canal, dock or light tolls, other tolls, waterway or any charges of similar kind chargeable under any law for the time being in force;

(o) claim by a master or member of the crew of a vessel or their heirs and dependents for wages or any sum due out of wages or adjudged to be due which may be recoverable as wages or cost of repatriation or social insurance contribution payable on their behalf or any amount an employer is under an obligation to pay to a person as an employee, whether the obligation arose out of a contract of employment or by operation of a law (including operation of a law of any country) for the time being in force, and includes any claim arising under a manning and crew agreement relating to a vessel, notwithstanding anything contained in the provisions of sections 150 and 151 of the Merchant Shipping Act, 1958;

(p) disbursements incurred on behalf of the vessel or its owners;

(q) particular average or general average;

(r) dispute arising out of a contract for the sale of the vessel;

(s) insurance premium (including mutual insurance calls) in respect of the vessel, payable by or on behalf of the vessel owners or demise charterers;

(t) commission, brokerage or agency fees payable in respect of the vessel by or on behalf of the vessel owner or demise charterer;

(u) damage or threat of damage caused by the vessel to the environment, coastline or related interests; measures taken to prevent, minimise, or remove such damage; compensation for such damage; costs of reasonable measures for the restoration of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; or any other damage, costs, or loss of a similar nature to those identified in this clause;

(v) costs or expenses relating to raising, removal, recovery, destruction or the rendering harmless of a vessel which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such vessel, and costs or expenses relating to the preservation of an abandoned vessel and maintenance of its crew; and

(w) maritime lien.

Explanation.—For the purposes of clause (q), the expressions “particular average” and “general average” shall have the same meanings as assigned to them in sub-section (1) of section 64 and sub-section (2) of section 66 respectively of the Marine Insurance Act, 1963.

(2) While exercising jurisdiction under sub-section (1), the High Court may settle any account outstanding and unsettled between the parties in

relation to a vessel, and direct that the vessel, or any share thereof, shall be sold, or make such other order as it may think fit.

(3) Where the High Court orders any vessel to be sold, it may hear and determine any question arising as to the title to the proceeds of the sale.

(4) Any vessel ordered to be arrested or any proceeds of a vessel on sale under this Act shall be held as security against any claim pending final outcome of the admiralty proceeding."

14. Under Section 5 of the Act, the High Court may order for the arrest of a vessel which is within its jurisdiction for the purpose of providing security against a maritime claim. Under Section 6 of the said Act, the High Court may also exercise admiralty jurisdiction by an order in personam in respect of the maritime claims referred to in Section 4. Section 9 of the Act sets out the *inter se* priority of maritime liens, but in so doing also informs us that they are restricted to five subject matters only. Section 9 reads as follows:

"Sec. 9 *Inter se* priority on maritime lien

(1) Every maritime lien shall have the following order of *inter se* priority, namely:—

(a) claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social

insurance contributions payable on their behalf;

(b) claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

(c) claims for reward for salvage services including special compensation relating thereto;

(d) claims for port, canal, and other waterway dues and pilotage dues and any other statutory dues related to the vessel;

(e) claims based on tort arising out of loss or damage caused by the operation of the vessel other than loss or damage to cargo and containers carried on the vessel.

(2) The maritime lien specified in sub-section (1) shall continue to exist on the vessel notwithstanding any change of ownership or of registration or of flag and shall be extinguished after expiry of a period of one year unless, prior to the expiry of such period, the vessel has been arrested or seized and such arrest or seizure has led to a forced sale by the High Court:

Provided that for a claim under clause (a) of sub-section (1), the period shall be two years from the date on which the wage, sum, cost of repatriation or social insurance contribution, falls due or becomes payable.

(3) The maritime lien referred to in this section shall commence—

(a) in relation to the maritime lien under clause (a) of sub-section (1), upon the claimant's discharge from the vessel;

(b) in relation to the maritime liens under clauses (b) to (e) of sub-section (1), when the claim arises,

and shall run continuously without any suspension or interruption:

Provided that the period during which the vessel was under arrest or seizure shall be excluded.

(4) No maritime lien shall attach to a vessel to secure a claim which arises out of or results from—

(a) damage in connection with the carriage of oil or other hazardous or noxious substances by sea for which compensation is payable to the claimants pursuant to any law for the time being in force;

(b) the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste."

15. Section 12 states that the Code of Civil Procedure is to apply in all proceedings before the High Court insofar as it is not inconsistent or contrary to the provisions of the Act. By Section 17, the Admiralty Court Acts of 1840 and 1861 and the Colonial Courts of Admiralty Acts of 1890 and 1891 stand repealed. Also, the Letters Patent of 1865, insofar as it applies to the admiralty jurisdiction of the Bombay, Calcutta and Madras High Courts, also stands repealed.

16. An admiralty action in the courts of India commences against a vessel to enforce what is called a "maritime claim". Though India is not a signatory to the Brussels Convention of

1952, a long list of maritime claims is given in Article 1 thereof. Suffice it to say that sub-clause (k) of Article 1 states that important materials wherever supplied to a ship for her operation or maintenance would fall within the definition of a maritime claim. A maritime lien, on the other hand, attaches to the property of the vessel whenever the cause of action arises, and travels with the vessel and subsists whenever and wherever the action may be commenced. In **The Bold Buccleugh**, (1852) 7 Moo PCC 267, Sir John Jervis defined maritime lien as follows:-

> "[A] maritime lien is well defined … to mean a claim or privilege upon a thing to be carried into effect by legal process … that process to be a proceeding in rem…. This claim or privilege travels with the thing into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached."

17. This judgment was referred to in **M.V. Elisabeth and others** v. **Harwan Investment and Trading Private Limited**, 1993 Supp. (2) SCC 433 at 462, paragraph 56 and **Epoch Enterrepots** v. **M.V. Won Fu** (2003) 1 SCC 305 at 311, paragraph 13. In **M.V. Al Quamar** v. **Tsavliris Salvage**

(International) Ltd. and others, (2000) 8 SCC 278 at 301, the Supreme Court observed as follows:-

> "33. Be it noted that there are two attributes to maritime lien: (a) a right to a part of the property in the res; and (b) a privileged claim upon a ship, aircraft or other maritime property in respect of services rendered to, or injury caused by that property. Maritime lien thus attaches to the property in the event the cause of action arises and remains attached. It is, however, inchoate and very little positive in value unless it is enforced by an action. It is a right which springs from general maritime law and is based on the concept as if the ship itself has caused the harm, loss or damage to others or to their property and thus must itself make good that loss. (See in this context *Maritime Law* by Christopher Hill, 2nd Edn.)."

18. Only a small number of claims give rise to maritime liens as was noted in **M.V. Won Fu** (supra). Paragraph 19 of the said judgment states as follows:-

> "19. We have in this judgment hereinbefore dealt with the attributes of maritime lien. But simply stated, maritime lien can be said to exist or restricted to in the event of (a) damage done by a ship; (b) salvage; (c) seamen's and master's wages; (d) master's disbursement; and (e) bottomry; and in the event a maritime lien exists in the aforesaid five circumstances, a right in rem is said to exist. Otherwise, a right in personam exists for any claim that may arise out of a contract."
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> (at pages 314-315)

19. In an illuminating judgment of the Calcutta High Court Justice Mrs. Ruma Pal, as she then was, dealt with an action in rem filed in the admiralty court jurisdiction in Calcutta. With respect to the plaintiffs claim of the price of bunkers supplied to the ship owners, the Court held that the supply of necessaries to a vessel does not create a maritime lien. In **Bailey Petroleum Company** v. **Owners and parties interested in the vessel M.V. Dignity**, (1993) 2 CHN 208 at 213-214, the learned Judge held:

> "16. It has been established by a wealth of decisions that the supply of necessaries does not create a maritime lien. Indeed the point was conceded by the counsel for the plaintiff at the hearing. It is only necessary to refer to two authorities on the point to emphasize the fact that this Court does not base its conclusion on the concession of the plaintiff's counsel but on the authorities cited.
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> 17. It is not disputed that the jurisdiction of this court is governed by the Admiralty Court Act 1861 (Imp). Section 5 of the 1861 Act provides:
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> > "5. The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that

> at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: Provided always, that if in any such cause the plaintiff do not recover twenty pounds, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said Court."

18. In the case of *Laws and others and Smith*: the "*Rio Tinto*": 9 PD 356, the plaintiff had supplied necessaries to the vessel. The Trial Court held that the necessaries were supplied on the credit of the vessel and that the plaintiff had a right to a maritime lien and that, therefore, in spite of the fact that the vessel had been transferred subsequent to the supply of necessaries, the ship was liable. Sir James Hannen who delivered the opinion of the Privy Council held that the phrase "the court shall have jurisdiction" simply gave the Court jurisdiction but did not create any lien. A distinction was drawn between a provision for proceedings by arrest of the ship and the express creation of a lien. The Court held:

> "The Admiralty Court Act, 1861 (24 Vict. c. 10) and the decisions upon it must next be considered. By the 5th section it is enacted that the High Court shall have jurisdiction over a claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that, at the time of the institution of the cause, any owner or part owner of the ship is domiciled in

England or Wales.

> The words ‘the High Court of Admiralty shall have jurisdiction’, mean only what they purport to say, neither more nor less, that is, that the court shall take judicial cognizance of the cases provided for.
>
> The conclusion [is] that there is nothing from which it can be inferred that by the use of the words “the court shall have jurisdiction” the Legislature intended to create a maritime lien with respect to necessaries supplied within the possession.”

19. In *Shell Oil Co.* v. *The Ship “Lastrigoni*” 3 ALR 399 the plaintiff had filed a suit for enforcement of the claim on the ground of bunkers provided by the plaintiff under a contract between the plaintiff and the agents of the time charterer. The contract provided that the sale and delivery of *inter alia* necessaries would be made on the faith and credit of the vessel. The arguments before the Court were that the supply of fuel itself created maritime lien to which the ship was subject and which could be enforced by an action *in rem* in admiralty. The second was that, in the circumstances, an action *in rem* lay notwithstanding the absence of any contractual liability on the part of the owners to pay for the bunkers supplied and that this was so by virtue of section 6 of the Admiralty Court Act 1840 (Imp), and section 5 of the Admiralty Court Act 1861 (Imp), either with or without the aid of cl. 6.4 of the Bunker Fuel Oil Contract. Menzies, J. held:

> "The matter was, I think, put at rest by the decision of the Privy Council in the Rio Tinto (1884) 9 APP Cas 356, by which it was decided that no maritime lien attaches to a ship in respect of coals or other necessaries supplied to it."

20. In **Saba International Shipping and Project Investment Private Limited** v. **Owners and parties interested in the Vessel M.V. Brave Eagle, previously known as M.V. Lima-I and others**, (2002) 2 CHN 280 at 287-288 and 289-290, another single Judge of the same High Court differentiated between a maritime claim and a maritime lien and held as follows:

> "20. Now the issue is what is a maritime claim and what is a maritime lien. These questions are to be answered in this proceeding before continuation of the interim order or passing any further interim order.
>
> 21. All cases of maritime lien are based on maritime claims but all maritime claims do not give rise to a maritime lien on the ship. Normally a lien in the general law is a rather limited right over some one else's property. It is a right to retain possession of that property usually to receive a claim. But a maritime lien differs from other liens in one very important respect. Liens generally require possession of the '*res*' before they can come into effect. As an example an innkeeper has a lien over

his guest's luggage against the payment of the bill, but if the guest is smart enough to remove his luggage, the innkeeper is left without a lien. But a maritime lien does not require prior possession for its creation. In a fit and proper case a claimant on the strength of his maritime lien can secure the arrest of a ship which then comes under the possession of the court and she cannot be moved without the court's order.

22. 'No Indian Statute defines a maritime claim' is the clear finding of Supreme Court in *M.V. Elisabeth* (AIR 1993 SC 1014, para 85, page 1040). But our Supreme Court followed the provisions of the Supreme Court Act 1981 of England where maritime claims have been listed on the basis of Brussels Convention of 1952 on the Arrest of Sea Going Ships. Under Article 1 of the said Convention various maritime claims have been catalogued. Out of which 1(k) answers the description of the claims of the plaintiff in this proceeding. Article 1(k) reads "goods or materials whether supplied to a ship for her operation or maintenance". Even though India is not a signatory to the Brussels Convention, but the Supreme Court held that the provisions of these Conventions should be regarded as part of International Common Law and these provisions 'supplement' and 'complement' our maritime laws and fill up the lacunae in The Merchant Shipping Act.

23. But in *Elisabeth*, the Hon'ble Supreme Court did not notice any convention on maritime lien. However the Hon'ble Supreme Court accepted in para 57 of Elisabeth the judicial determination of the concept of 'maritime lien' by English courts and which I quote as follows:

> “A maritime lien is a privileged claim against the ship or a right to a part of the property in the ship, and it “travels” with the ship. Because the ship has to “pay for the wrong it has done”, it can be compelled to do so by a forced sale. (See The Bold Buccleugh, (1852) 7 Moo PCC 267).”

24. A definition of maritime lien has also been given in Stroud’s Judicial Dictionary, 5th Edition page 1466 to the following effect:

> “A maritime lien may be defined as a right specifically binding a ship, her furniture, tackle, cargo, and freight, or any of them, for payment of a claim founded upon the maritime law and entitling the claimant to take judicial proceedings against the property bound to enforce, or to ascertain and enforce, satisfaction of his demand; thus, a salvor has a maritime lien on the property saved for such an amount as a court exercising admiralty jurisdiction shall award. Maritime lien are distinguished from all other liens in these two chief particulars: (i) they are in no way founded on possession or property in the claimant, (ii) they are exercised by taking proceedings against the property itself in a form of action styled an action *in rem* (The Glasgow Packet, 2 Rob. W. 312; The Repulse, 4 Notes of Cas. 170), and, from this and their secret nature, they closely resemble the species of security known to Roman law under the name of

> hypotheca (Dig. xiii). Interest, if any allowed, and the costs of enforcing a claim for which a maritime lien exists, will be included in such lien (The Margaret, 3 Hagg. Adm. 240)."

25**.** According to the well known treatise of Thomas on maritime lien, the following claims may give rise to maritime lien namely:

> "(a) Damage done by a ship
> (b) Salvage
> (c) Seamen's wages
> (d) Master's wages and disbursements
> (e) Bottomry and respondentia".

26. The aforesaid passage from Thomas has been approved by the Division Bench of Calcutta High Court in *Mohammed Saleh Behbehani & Company* v. *Bhoja Trader*, reported in (1983) 2 Calcutta Law Journal 334. At 344 of the report, the learned Judges of the Division Bench referred to maritime liens as representing 'a small cluster of claims' and referred to the aforementioned passage from Thomas.

(27) and (28) xxx xxx xxx

29. Counsel for the respondent also relies on a passage from Roscoe on The Admiralty Jurisdiction and Practice, 5th Edition. While dealing with necessaries, the learned author has stated as follows:

> "Persons who have supplied a ship, whether British or foreign, with necessaries have not a maritime lien upon her, and the vessel does not become chargeable with the debt till the

> suit is actually instituted; consequently there can be no claim against a ship which has been sold, even with notice of such a claim in respect of which an action has not been commenced, and a want of caution in supplying the necessaries may, it would seem, cause a postponement of claims to others more carefully begun. The necessaries claimant is not a secured creditor until the moment of arrest."

30. There is a direct judgment on this point by a learned Judge of this court in *Bailey Petroleum*, referred to above.

31. Relying on the judgment of the Privy Council in *Rio Tinto*, reported in 1884 (9) Appeal Cases 356 and the judgment in *Shell Oil Co.* v. *The Ship Lastrigoni*, reported in 1974 (3) All England Reports 399, the learned single Judge held in Bailey Petroleum that a claim arising out of the supply of necessaries may give rise to a statutory right of action '*in rem*' under section 5 of Admiralty Court Act, 1861 but it does not give rise to maritime lien. Paragraphs 23 and 24 of the judgment in Bailey Petroleum make it clear and I quote them in extenso:

> "23. Whereas a maritime lien attaches to the *res* and travels with it and may be enforced against a subsequent purchaser of the *res*, a statutory right of action *in rem* is defeated by a change of ownership. This later principle follows from the nature of the right described in

the preceding paragraph.

24. This view of the law is supported by a catena of decisions."

21. In fact, the International Convention on Maritime Lien and Mortgages, 1993 defines maritime liens in Article 4 as follows:-

"**Article 4: Maritime liens**

I. Each of the following claims against the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel:

(a) claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;

(b) claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

(c) claims for reward for the salvage of the vessel;

(d) claims for port, canal, and other waterway dues and pilotage dues;

(e) claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.

2. No maritime lien shall attach to a vessel to secure claims as set out in subparagraphs (b) and (e) of

paragraph 1 which arise out of or result from:

(a) damage in connection with the carriage of oil or other hazardous or noxious substances by sea for which compensation is payable to the claimants pursuant to international conventions or national law providing for strict liability and compulsory insurance or other means of securing the claims; or

(b) the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste."

22. Article 8 then states that the characteristics of such liens are as follows:-

"**Article 8: Characteristics of maritime liens**

Subject to the provisions of article 12, the maritime liens follow the vessel, notwithstanding any change of ownership or of registration or of flag."

It is, thus, clear that a claim for necessaries supplied to a vessel does not become a maritime lien which attaches to the vessel.

23. Shri Divan, however, cited U.S. case law in support of his submission that a claim for necessaries raises a maritime lien. We are afraid that given the Indian case law on the subject read with the various international Conventions referred to above,

the U.S. seems to stand alone in considering that claims for necessaries would amount to maritime lien enforceable against the vessel as such wherever it goes. It is clear that in our country at least claims for necessaries, though maritime claims, do not raise a maritime lien.

24. What arises next, therefore, is the manner of enforcement of maritime claims in our Courts. In **M.V. Elisabeth** (supra) at 459-462, this Court laid down, in some detail, the basic features of the admiralty jurisdiction in this country, and how maritime claims are to be enforced. The Court held:

> "Admiralty Law confers upon the claimant a right *in rem* to proceed against the ship or cargo as distinguished from a right *in personam* to proceed against the owner. The arrest of the ship is regarded as a mere procedure to obtained security to satisfy judgment. A successful plaintiff in an action *in rem* has a right to recover damages against the property of the defendant. "The liability of the shipowner is not limited to the value of the *res* primarily proceeded against …. An action … though originally commenced *in rem*, becomes a personal action against a defendant upon appearance, and he becomes liable for the full amount of a judgment unless protected by the statutory provisions for the limitation of liability".' (Roscoe's *Admiralty Practice*, 5th ed. p. 29)

The foundation of an action *in rem*, which is a peculiarity of the Anglo-American law, arises from a maritime lien or claim imposing a personal liability upon the owner of the vessel. A defendant in an admiralty action *in personam* is liable for the full amount of the plaintiff's established claim. Likewise, a defendant acknowledging service in an action *in rem* is liable to be saddled with full liability even when the amount of the judgment exceeds the value of the *res* or of the bail provided. An action *in rem* lies in the English High Court in respect of matters regulated by the Supreme Court Act 1981, and in relation to a number of claims the jurisdiction can be invoked not only against the offending ship in question but also against a 'sistership' i.e., a ship in the same beneficial ownership as the ship in regard to which the claim arose.

> "The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner …." (Per Justice Story, *The United States* v. *The Big Malek Adhel* [43 US (2 How) 210, 233 (1844)])."

xxx xxx xxx

A ship may be arrested (*i*) to acquire jurisdiction; or (*ii*) to obtain security for satisfaction of the claim when decreed; or (*iii*) in execution of a decree. In the first two cases, the court has the discretion to insist upon security being furnished by the plaintiff to compensate the defendant in the event of it being found that the arrest was wrongful and was sought and obtained maliciously or in bad faith. The claimant is liable in damages for wrongful arrest.

This practice of insisting upon security being furnished by the party seeking arrest of the ship is followed in the United States, Japan and other countries. The reason for the rule is that a wrongful arrest can cause irreparable loss and damages to the shipowner; and he should in that event be compensated by the arresting party. (See *Arrest of Ships* by Hill, Soehring, Hosoi and Helmer, 1985).

The attachment by arrest is only provisional and its purpose is merely to detain the ship until the matter has been finally settled by a competent court. The attachment of the vessel brings it under the custody of the Marshal or any other authorized officer. Any interference with his custody is treated as a contempt of the court which has ordered the arrest. But the Marshal's right under the attachment order is not one of possession, but only of custody. Although the custody of the vessel has passed from the defendant to the Marshal, all the possessory rights which previously existed continue to exist, including all the remedies which are based on possession. The warrant usually contains a monition to all persons interested to appear before the court on a particular day and show cause why the property should not be condemned and sold to satisfy the claim of the plaintiff.

The attachment being only a method of safeguarding the interest of the plaintiff by providing him with a security, it is not likely to be ordered if the defendant or his lawyer agrees to "accept service and to put in bail or to pay money into court in lieu of bail". (See *Halsbury's Laws of England*, 4th edn., Vol. 1, p. 375 etc.).

xxx xxx xxx

A personal action may be brought against the defendant if he is either present in the country or submits to jurisdiction. If the foreign owner of an arrested ship appears before the court and deposits security as bail for the release of his ship against which proceedings *in rem* have been instituted, he submits himself to jurisdiction.

An action *in rem* is directed against the ship itself to satisfy the claim of the plaintiff out of the *res*. The ship is for this purpose treated as a person. Such an action may constitute an inducement to the owner to submit to the jurisdiction of the court, thereby making himself liable to be proceeded against by the plaintiff *in personam*. It is, however, imperative in an action *in rem* that the ship should be within jurisdiction at the time the proceedings are started. A decree of the court in such an action binds not merely the parties to the writ but everybody in the world who might dispute the plaintiff's claim.

It is by means of an action *in rem* that the arrest of a particular ship is secured by the plaintiff. He does not sue the owner directly and by name; but the owner or any one interested in the proceedings may appear and defend. The writ is issued to "owners and parties interested in the property proceeded against". The proceedings can be started in England or in the United States in respect of a maritime lien, and in England in respect of a statutory right *in rem*. A maritime lien is a privileged claim against the ship or a right to a part of the property in the ship, and it "travels" with the ship. Because the ship has to "pay for the wrong it has done", it can be compelled to do so by a forced sale. [See *Bold Buccleaugh (The)* [*Harmer* v. *Bell*, (1851) 7 Moo PC 267 : 13 ER 884]]. In addition to maritime liens, a ship is liable to be arrested in England in enforcement of statutory rights *in*

> *rem* (Supreme Court Act 1981). If the owner does not submit to the jurisdiction and appear before the court to put in bail and release the ship, it is liable to be condemned and sold to satisfy the claims against her. If, however, the owner submits to jurisdiction and obtains the release of the ship by depositing security, he becomes personally liable to be proceeded against *in personam* in execution of the judgment if the amount decreed exceeds the amount of the bail. The arrest of the foreign ship by means of an action *in rem* is thus a means of assuming jurisdiction by the competent court."

25. The Court went on to hold that though Indian statutes lag behind international law in this context, the principles in these Conventions derived from the common law of nations, will be treated as a part of the common law of India. Paragraph 76 in this behalf reads as under:-

> "76**.** It is true that Indian statutes lag behind the development of international law in comparison to contemporaneous statutes in England and other maritime countries. Although the Hague Rules are embodied in the Carriage of Goods by Sea Act, 1925, India never became a party to the International Convention laying down those rules (International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 1924). The Carriage of Goods by Sea Act, 1925 merely followed the (United Kingdom) Carriage of Goods by Sea Act, 1924. The United Kingdom repealed the Carriage of Goods by Sea Act, 1924 with a view of incorporating the Visby Rules adopted by the Brussels Protocol of 1968.

The Hague-Visby Rules were accordingly adopted by the Carriage of Goods by Sea Act 1971 (United Kingdom). Indian legislation has not, however, progressed, notwithstanding the Brussels Protocol of 1968 adopting the Visby Rules or the United Nations Convention on the Carriage of Goods by Sea, 1978 adopting the Hamburg Rules. The Hamburg Rules prescribe the minimum liabilities of the carrier far more justly and equitably than the Hague Rules so as to correct the tilt in the latter in favour of the carriers. The Hamburg Rules are acclaimed to be a great improvement on the Hague Rules and far more beneficial from the point of view of the cargo owners. India has also not adopted the International Convention relating to the Arrest of Seagoing Ships, Brussels, 1952. Nor has India adopted the Brussels Conventions of 1952 on civil and penal jurisdiction in matters of collision; nor the Brussels Conventions of 1926 and 1967 relating to maritime liens and mortgages [(a) International Convention relating to the Arrest of Seagoing Ships, Brussels, May 10, 1952 (IMC); (b) International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision, Brussels, May 10, 1952 (IMC); (c) International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision, Brussels, May 10, 1952 (IMC); and (d) International Conventions for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages, Brussels, April 10, 1926, and the Revised Convention on Maritime Lines and Mortgages, Brussels, May 29, 1967 (IMC).] India seems to be lagging behind many other countries in ratifying and adopting the beneficial provisions of various conventions intended to facilitate international trade. Although these conventions have not been adopted by legislation, the principles incorporated in the conventions are themselves derived from the

> common law of nations as embodying the felt necessities of international trade and are as such part of the common law of India and applicable for the enforcement of maritime claims against foreign ships."
>
> (at pages 469-470)

A list of maritime claims was then referred to in paragraph 84 and the Brussels Convention relating to the Arrest of Sea-Going Ships, 1992 was referred to and followed.

26. The next important aspect that was argued was that the ownership of the vessel to enforce a maritime claim has to be seen at the stage of institution of the suit and not at the stage of arrest. The general rule that is contained in our country as to what crystallises on the date of a suit is reflected in **Rameshwar and others** v. **Jot Ram and others**, 1976 1 SCR 847 at 851-52. This Court held:-

> "In *P. Venkateswarlu* v. *Motor & General Traders* [(1975) 1 SCC 770, 772 : AIR 1975 SC 1409, 1410] this Court dealt with the adjectival activism relating to post-institution circumstances. Two propositions were laid down. Firstly, it was held that [SCC p. 772, para 4] 'it is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding.' This is an emphatic statement that the right of a party is determined by the facts as they exist *on the date the action is instituted*.

Granting the presence of such facts, then he is entitled to its enforcement. Later developments cannot defeat his right because, as explained earlier, had the court found his facts to be true the day he sued he would have got his decree. The Court's procedural delays cannot deprive him of legal justice or rights crystallised in the initial cause of action. This position finds support in *Bhajan Lal* v. *State of Punjab* [(1971) 1 SCC 34].

The impact of subsequent happenings may now be spelt out. First, its bearing on the *right* of action, second, on the nature of the *relief* and third, on its impotence to create or destroy substantive rights. Where the nature of the relief, as originally sought, has become obsolete or unserviceable or a new form of relief will be more efficacious on account of developments subsequent to the suit or even during the appellate stage, it is but fair that the relief is moulded, varied or reshaped in the light of updated facts. *Patterson* [*Patterson* v. *State of Alabama*, (1934) 294 US 600, 607] illustrates this position. It is important that the party claiming the relief or change of relief must have *the same right* from which either the first or the modified remedy may flow. Subsequent events in the course of the case cannot be constitutive of *substantive rights* enforceable in that very litigation except in a narrow category (later spelt out) but may influence the equitable jurisdiction to mould *reliefs*. Conversely, where rights have already vested in a party, they cannot be nullified or negated by subsequent events save where there is a change in the law and it is made applicable at any stage. *Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chaudhuri* [1940 FCR 84 : AIR 1941 FC 5] falls in this category. Courts of justice may, when the compelling equities of a case oblige them, shape *reliefs* — cannot deny rights — to make them justly relevant in the updated

circumstances. Where the relief is discretionary, courts may exercise this jurisdiction to avoid injustice. Likewise, where the right to the remedy depends, under the statute itself, on the presence or absence of certain basic facts *at the time the relief is to be ultimately granted*, the Court, even in appeal, can take note of such supervening facts with fundamental impact. *Venkateswarlu*, read in its statutory setting, falls in this category."

27. However, the International Convention on the Arrest of Ships, 1999, in which India participated, states as follows:-

"**Article 3: Exercise of right of arrest**

1. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:

(a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or

(b) – (e) xxx xxx xxx

(2) xxx xxx xxx

3. Notwithstanding the provisions of paragraphs 1 and 2 of this article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship."

28. India is not a signatory to the aforesaid Convention, yet following **M.V. Elisabeth** (supra), this Convention becomes part

of our national law and must, therefore, be followed by this Court. Article 3(1)(a) is in two parts. First, arrest is only permissible of any ship if a maritime claim is asserted against the person who owned the ship at a time when the maritime claim arose for which the owner is liable, and second, that the same ship owner should be the owner of the ship when the arrest is effected. Thus, article 3(1)(a) sets the controversy at rest because a maritime claim can be asserted only at the time the arrest is effected and not at the time of the institution of the suit. This being so, Shri Divan's reliance on English judgments to the contrary, namely **Monica S.** (1967) 2 Lloyd's Rep. 113 as followed in **Re, Aro Co Limited** 1980 1 All ER 1067, cannot be followed. Both judgments were prior to the 1999 Convention and it is this Convention that must be followed. It is, therefore, clear that the relevant date on which ownership of the vessel is to be determined is the date of arrest and not the date of institution of the suit.

29. At this stage it becomes important to refer to the agreement dated 18.1.2000 entered into between the petitioner

and the original owner of the vessel, Third Element Enterprises. The agreement has been set out fully earlier in this judgment. A perusal of the agreement would show that so far as the appellant is concerned, performance is over — namely that a certain quantity of bunkers has in accordance with the original agreement been supplied. Indeed this is expressly recited in the later agreement. It is only performance under the original agreement that is lacking from the side of the owner of the vessel, namely Third Element Enterprises. The very first clause of the agreement shows that the ship owners confirm that they owe to the appellant the original amount of the bunkers plus interest plus legal costs, which amounts are parasitic on the original invoice amount of US$ 94,611.25, and need to be recovered in order to put the appellant in the same position as if the original contract had been performed by Third Element Enterprises. The agreement then goes on to state that since the vessel is being chartered for a voyage from Bangkok and will earn freight, the part of the freight amounting to the original invoice amount plus interest plus legal costs will be paid directly by the charterers of the vessel to the bank account of the

appellants.

30. Sections 62 and 63 of the Contract Act read as follows:-

> "62. **Effect of novation, rescission, and alteration of contract**.—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.
>
> 63. **Promisee may dispense with or remit performance of promise.**— Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit."

31. It is the appellant's case that Section 63 of the Contract Act is attracted to the facts of the present case whereas it is the respondent's case that Section 62 is so attracted, the result being that the original agreement is substituted by a fresh agreement.

32. The respondent's case is that Section 62 applies, since the original contract has been "altered". This being the case, the original contract need not be performed.

33. It is clear that where parties to a contract agree to substitute a completely different contract for the first, or to

rescind a contract, the performance under the original contract and/or rescinded contract comes to an end. When parties to a contract "alter" a contract, the question that has to be answered is as to whether the original contract is altered in such a manner that performance under it is at an end.

34. In **Juggilal Kamlapat** v. **N.V. Internationale Crediet-En-Handels Vereeninging 'Rotter-dam'**, AIR 1955 Cal 65, the original contract dated 10.8.1950 contained an arbitration clause. In paragraph 11 of the judgment, it was found as a fact that the original contract was modified in certain material particulars. Despite this, it was found that since the modifications do not go to the root of the original contract and do not change its essential character, the facts do not warrant the inference that the parties intended to rescind the original contract. The High Court held:-

> "14. In the present case the modifications do not go to the very root of the first contract and do not change its essential character. The facts do not warrant the inference that the parties intended to rescind the contract, dated 10-8-1950. The April arrangement was entered into in response to pressing demands for delivery under that contract and with a view to implement it. The arrangement

has no independent contractual force, no meaning and content separately from and independently of the original contract.

15. The effect of the alterations or modifications is that there is a new arrangement; in the language of Viscount Haldane in 1918 A. C. 1 at p. 17 (A),

> "a new contract containing as an entirety the old terms together with and as modified by the new terms incorporated."

The modifications are read into and become part and parcel of the original contract. The original terms also continue to be part of the contract and are not rescinded and/or superseded except in so far as they are inconsistent with the modifications. Those of the original terms which cannot make sense when read with the alterations must be rejected. In my view the arbitration clause in this case is in no way inconsistent with the subsequent modifications and continues to subsist."

(at page 67)

35. We approve of the said judgment as laying down the correct law on the expression "alter" in Section 62 of the Contract Act. In order that a contract that is altered in material particulars fall under Section 62, it must be clear that the alteration must go to the very root of the original contract and change its essential character, so that the modified contract must be read as doing away with the original contract. If the

modified contract has no independent contractual force, in that it has no meaning and content separately from and independently of the original contract, it is clear that there is no new contract which comes into being. The original terms continue to be part of the modified contract except to the extent that they are inconsistent with the modifications made.

36. On the other hand, Section 63 of the Contract Act would clearly apply to the facts of the present case. Illustration "c" to Section 63 is apposite, and reads as follows:-

> "(c) A owes B 5,000 rupees. C pays to B 1,000 rupees and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim."

37. The aforesaid illustration makes it clear that a promisee may accept satisfaction from a third party which then discharges the promisor from further performance of the original contract.

38. In **Kapur Chand Godha** v. **Mir Nawab Himayatalikhan Azamjah,** (1963) 2 SCR 168, one Baboo Mull and Company sold and delivered to the Prince of Berar various articles of jewellery. The jewellery was, in fact, delivered by the appellants

to the Prince. Several payments were made by a Princes Debts Settlement Committee. Ultimately, a payment for a sum of Rs.27,79,078/- was made which was received by the appellant stating that payment had been made in full.

39. Since a balance of Rs.9,99,940/- still remained, the appellants filed a suit against the respondent-Prince. The suit was allowed by the trial court but dismissed by the first Appellate Court which came to a contrary conclusion. The Supreme Court agreed with the Appellate Court in dismissing the suit. It was, therefore, held:

> "There was some difference of evidence as to whether Ex. C bore the signature of Kapurchand when it was first presented to Madhava Rao or whether the signature was later put on it. With that difference we are not now concerned. Nor are we concerned with certain minor discrepancies between the evidence of the two witnesses referred to above. The substantial result of the evidence of the two witnesses to whom we have referred is that whatever reluctance Kapurchand might have had in accepting Rs. 20 lacs in full satisfaction of the claim of the appellants, he ultimately agreed to do so. Not only did he agree, but he actually endorsed full satisfaction and payment on all the promissory notes and thereafter he received payment of the second instalment of Rs. 8,75,000/ which along with the first instalment of Rs.11,25,000/- made up the sum of Rs. 20 lacs. On these facts which are

established by the evidence given on behalf of the appellants themselves, the only conclusion is that there was full satisfaction of the claim of the appellants.

The legal position is clear enough. Section 63 of the Indian Contract Act reads:

> "Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit."

Illustration (c) to the section says

> "A owes B 5000 rupees. C pays to B 1000 rupees, and B accepts them in satisfaction of his claim on A. This payment is a discharge of the whole claim."

It seems to us that this case is completely covered by s. 63 and illustration (c) thereof. The appellants having accepted payment in full satisfaction of their claim, are not now entitled to sue the respondent for the balance."

(at pages 178-179)

This Court further went on to hold that the niceties of English Law in the matter of accord and satisfaction do not concern Indian Courts in view of Section 63 of the Act.

40. It is clear that on the facts in the present case as the original contract has been performed only by one party to the contract and not by the other, the second agreement is entered into so that the promisee (i.e. the appellant herein) may accept, instead of the original performance of the agreement, any satisfaction which it thinks fit. Thus, the agreement deals with one leg of the original transaction, the leg of payment which has not yet been made while keeping the original transaction alive. The other clauses of the agreement buttress this conclusion. Under clause 4, the ship owner will not sell the vessel prior to the satisfaction of the aforesaid claim. And, above all, under clause (6), if for any reason the said payment is not made, the appellant will be entitled to take all appropriate legal steps, which include arrest of the vessel, for recovery of the said amount. Even by clause (8), the original agreement is kept alive. In the event that the ship is unable to proceed to Bangkok, the appellant maintains its rights of recovery against the shipowner and the vessel. If the original agreement had disappeared by novatio, there is no question of taking appropriate steps to arrest the vessel which is owned by the

ship owner who is the promisee and who has not yet performed his part of the contract. A guarantee clause contained in clauses 7 and 8 is again only an additional string to the bow of payment. The fact that exclusive jurisdiction is given to the courts at Piraeus, Greece has to be read with clause 6 of the agreement. Obviously, arrest of the vessel for recovering the aforesaid amount in case payment is not made can be at any port, and not merely at Piraeus. For all these reasons, we are of the view that the aforesaid agreement read as a whole does not amount to a novatio of the original agreement, but was in fact entered into keeping the original agreement alive in order to ensure that payment under the original agreement is made to the appellants. In fact, the agreement dated 18.1.2000 is not a settlement of the original claim at a lesser amount. As has been held by us, it is only a means of enforcing the payment leg of the original transaction through a third party charterer. Consequent upon the vessel not sailing to Bangkok or the third party charterer failing to make payment, the original obligation of the appellant continued, and was enforceable by the arrest of the vessel. It is settled law that an agreement such as the

agreement dated 18.1.2000 is not to be construed legalistically but is to be construed as ordinary businessmen would construe it. In words which have become classic, Lord Wright in **Hillas** v. **Arcos**, [1932] All ER 494 at 503-504, has stated:-

> "Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except insofar as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period, the parties may not be able nor may they desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract."

41. Equally in **Satya Jain and others** v. **Anis Ahmed Rushdie and others** (2013) 8 SCC 131 at 143, this Court has held:-

"The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in *Moorcock* [(1889) LR 14 PD 64 (CA)]. This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied—the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of Bowen, L.J. in *Moorcock* [(1889) LR 14 PD 64 (CA)] sums up the position: (PD p. 68)

> "… In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

42. Reading the agreement through the prism of a businessman's eye, it is clear that all that the agreement does is to reinforce the original agreement by seeing that the payment under the said agreement is made. We, therefore, disagree with the view taken by the Division Bench that there is a novatio of the original agreement in the fact circumstance of the present case.

43. However, Mr. Banerjee cited a passage from Halsbury's Laws of England and strongly relied upon a Singapore High Court judgment to argue otherwise. The passage from Halsbury (Vol. 37, 4th ed., p. 287) reads as follows:-

> "**391. Effect of settlement or compromise.** Where the parties settle or compromise pending proceedings, whether before, at or during the trial, the settlement or compromise constitutes a new and independent agreement between them made for good consideration. Its effects are (1) to put an end to the proceedings, for they are thereby spent and exhausted; (2) to preclude the parties from taking any further steps in the action, except where they have provided for liberty to apply to enforce the agreed terms; and (3) to supersede the original cause of action altogether. A judgment or order made by consent is binding unless and until it has been set aside in proceedings instituted for that purpose and it acts, moreover, as an estoppel by record."

44. It is important to remember that when Section 63 of the Contract Act is to be applied, the High Courts in India have cautioned that, being a wide departure from English law, the Section alone should be enforced according to its terms and not in accordance with English law. Thus, in **New Standard Bank, Ltd. *v.* Probodh Chandra Chakravarty**, AIR 1942 Cal 87 at 90-91, the Calcutta High Court held:-

> "By s. 63, Contract Act, every promisor may dispense with or remit wholly or in part the performance of the promise made to him or may accept instead of it any satisfaction which he thinks fit. This section makes a wide departure from the English law, inasmuch as it does not refer to any agreement and valuable consideration. It should not therefore, be enlarged by any implication of English doctrine: *Chunna Mal Ram Nath* v. *Mool Chand-Ram Bhagat* [(1928) I.L.R. 9 Lah. 510 (518) : L.R. 55 I.A. 154 (160)]."

45. To similar effect is a judgment of the Bombay High Court reported as **Anandram Mangturam** v. **Bholaram Tanumal**, AIR 1946 Bom 1 at 6, in which Chagla, J. stated:-

> "But the learned Judge expresses his opinion that time can be extended even though the promisee may not bind himself to do so. With great respect to the learned Judge, I cannot accept that part of the statement of the law. The learned Judge's judgment

> is based on English decisions to which he has referred in his judgment. The Privy Council has repeatedly warned Courts in India not to import doctrines of common law when construing the plain sections of the Contract Act and the danger of relying on principles of Common Law is all the greater in this case when one remembers that s. 63, Contract Act constitutes a wide departure from the principles of the English common law."

46. Even if the passage in Halsbury is to be applied, it is obvious that the settlement terms spoken of must be made for good consideration, which is absent under Section 63. Also, for such settlement to constitute a new and independent agreement, it must put an end to the proceeding which is thereby spent and exhausted; and it is for this reason that the original cause of action is superseded altogether. We have seen on the facts of the present case how, by the order dated 25.1.2000, the application in Suit No.1 of 2000 alone was dismissed for non-prosecution, only interim orders were vacated and it was stated that "the vessel shall cease to be under arrest as of now." It is clear, therefore, that in accordance with the agreement dated 18.1.2000, the proceedings were not put an end to. Neither was the original

cause of action superseded, as we have stated earlier. The moment there is a breach of the settlement agreement, the appellants would be entitled to take appropriate legal steps against the ship owner, including the arrest of the vessel, which can only be if the original contract still subsists.

47. Mr. Banerjee laid great reliance on a judgment of the Singapore High Court in **The Dilmun Fulmar**, (2003) SGHC 270. On the facts of that case, the ship repairers repaired the vessel and supplied material to the vessel. The ship owner paid a sum of $650,000 for repairs, leaving an outstanding balance sum of $770,822.28 as at 8.5.2001. A subsequent settlement agreement was entered into in which the ship repairer agreed to accept a total sum of $310,000, inclusive of $25,000 interest and $25,000 as legal costs in full and final settlement of their claim in the admiralty suit, which was for a sum of $1,154,916.78. Paragraph 7 of the said judgment is important and reads as under:

> "7. The issue raised by this appeal touched on the true construction and effect of the Settlement Agreement. In coming to my decision to set aside the writ and warrant of arrest, I had to construe the

> accord. Generally, an agreement of compromise would discharge all original claims and counterclaims unless it expressly provides for their revival in the event of breach. The Settlement Agreement was worded in such a way that there was by its terms an immediate binding compromise of the claim amount of $1,154,916.78. By cl 1, the plaintiff agreed to accept a sum of $310,000 inclusive of interest and legal costs in full and final settlement of a larger claim..."

48. From this paragraph, it is clear that the plaintiffs agreed to accept a lesser sum in full and final settlement of a larger claim and this was the amount stated in the settlement agreement. Indeed, in paragraphs 11 and 13 of the judgment, it is stated:

> "11…The plaintiffs' solicitors in a fax dated 1 August 2002 wrote: "*[T]he sum due is in fact S$170,000 as stated in the Settlement Agreement together with interest thereon up to 23rd January 2002 …*"
>
> "13…There was no explanation as to where the figure of $170,000 had come from if it was not from the Settlement Agreement..."

49. On the facts of that case it was, therefore, held that the original cause of action had been superseded and that the Court had no jurisdiction in respect of the original claim.

50. This case is wholly distinguishable in that, on the facts of the present case, the very sum due under the original contract continued to be due and payable under the settlement agreement. The fact that interest and legal costs were added would not amount in itself to superseding the original contract, as these relate to payments under the original contract and put the promisee in the same position as if the contract had originally been performed. We have also seen that the original agreement was not superseded but was only sought to be enforced, the manner of performance being different. This being the case, we are of the view that the High Court's conclusion that there was a novatio of the original agreement on the facts of the present case is incorrect.

51. It only remains to be considered as to whether, on the date of arrest i.e. 2.5.2000, respondent no. 1 happened to be the owner of the vessel, as was found by the impugned judgment.

52. The High Court strongly relied upon an oral admission of PW1 to the effect that respondent no.1 had become the owner

of the vessel sometime in April 2000. On going through the deposition of Mr. Stephen Livanos, we are clearly of the view that no such admission was ever made. The answers to questions 257 to 262 would clearly show that the witness's statement that respondent no.1 was the end buyer of the vessel was equivocal at best, and was obviously hearsay as the answer to question 260 states that a lawyer in Greece had at some point of time told Mr. Livanos what happened with the vessel. To therefore conclude from this oral evidence that the vessel had changed hands in April, 2000 does not take the respondent's case very far.

53. However, the High Court also relied upon a notarized bill of sale dated 14.4.2000, the notice of readiness of 15.4.2000, which was accepted by the respondent at 11.00 A.M, and was followed by the delivery of possession of the vessel at 2.00 P.M. What is important to note is that the signatory to the physical delivery certificate was on behalf of Pennon Shipping Corporation, which was only an agent of Third Element Enterprises, and not an agent of Fairsteel. The High Court then

went on to state that payment under the Letter of Credit was also made on 26.4.2000 and since this would show that the property in the vessel was transferred in April, 2000, no cause of action would survive against the new owner of the vessel namely respondent no.1. The High Court also went on to state that the transfers pleaded in the written statement of respondent no. 1, namely from Third Element Enterprises to Eastern Wealth Investment Limited and thereafter to Fairsteel Corporation Limited after which Fairsteel sold and transferred the vessel to respondent no.1, had not been proved by respondent no.1, but that this did not affect the respondent's case.

54. We have been shown a bill of sale dated 27.4.2000 by which Third Element Enterprises effected the first of these four sales to Eastern Wealth Investment Limited, only on 27.4.2000. This sale has for its consideration "one US Dollar and/or other valuable consideration" casting grave doubts about its efficacy in law. Be that as it may, since this sale is the first sale in the chain of sales made ultimately to respondent no.1, it is obvious

that the sale made by Fairsteel to respondent no.1 could only have been after this date. Shri Banerjee cited before us authorities to the effect that it is well known that back to back sales of this nature take place between different parties for the same vessel. That may well be so, but it is still necessary to prove and explain each back to back sale from which respondent no.1 ultimately derives its title, in accordance with its pleading in the written statement filed by it. As has correctly been held by the High Court, there is no proof of any of these back to back sales, and in point of fact the very first sale from the original owner has taken place in favour of Eastern Wealth after the High Court has found that the vessel has been sold by Fairsteel to respondent no.1, which goes contrary to the pleaded case of respondent no.1 itself. We were also referred to a document dated 26.4.2000 by which a new clause 8 was to be added to the Letter of Credit which read as follows:-

> "COPY OF FREE OF ENCUMBRANCES CERTIFICATE ISSUED BY EMBASSY OF REPUBLIC OF CYPRUS, MARITIME SECTION, PIRAEUS, CERTIFYING THAT THE MOTOR VESSEL "NIKOLAS S" PERMANENTLY REGISTERED IN THE CYPRUS REGISTER OF

SHIPS, OWNED BY "THIRD ELEMENT ENTERPRISES SHIPPING LTD." OF CYPRUS IS FREE OF MORTGAGE AND ANY OTHER ENCUMBRANCES."

Further, as per clause no.8 we confirm that the Buyers have received the Notice of Readiness (NOR) on 15.04.2000 from the Sellers or their Agents in Calcutta and authorize you to negotiate the L/C as per the terms."

This clause would again go to show that even on 26.4.2000 the owner of the vessel was Third Element Enterprises and not respondent no.1.

55. With regard to the High Court finding that full payment had been made under the Letter of Credit on 26.4.2000, the respondent's own suit that was filed by it against Fairsteel on 9.5.2000 shows that no such payment had been made by the date of the filing of the said suit. The suit was for the relief of rescission of the agreement between Fairsteel and respondent no.1 dated 21.1.2000 on the ground of fraud. Para 27 of the suit is important and states as follows:-

"27. In the facts and circumstances aforestated, the defendant no.1 has fraudulently induced the plaintiff to issue/open the said L/C through the defendant no.2 in favour of the defendant no.1. The defendant no.1 is not entitled to receive and should

be restrained from receiving any payment under the said L/C and the plaintiff claims a decree of perpetual injunction in that regard."

56. The relief claimed in the other suit is also important and prayers "C" and "D" are material and read as under:-

"(c) Decree of perpetual injunction restraining the defendant no.1 whether by itself or through its servants or agents from receiving any money under the Letter of Credit No.CAL/24006 dated 8th April 2000, issued by the defendant no.2 in favour of the defendant no.1.

(d) Decree of perpetual injunction restraining the defendant no.2 from making any payment under the Letter of Credit No.CAL/24006 dated 8th April 2000 issued/opened by it in favour of the defendant no.1."

57. This would show, on the respondent's own admission made in the plaint dated 9.5.2000, that monies were not yet received under the Letter of Credit even on 9.5.2000 and that, therefore, an injunction should be granted restraining defendant no.1 from receiving this money and against the Bank of Baroda – plaintiff's bank – from making any such payment to defendant no.1. Thus, it is clear that the High Court was not correct in its view that it was proved by respondent no.1 that sale had taken

place in April, 2000 by Fairsteel Corporation to respondent no.1 by which respondent no.1 became the owner of the vessel. It is clear, therefore, that respondent no. 1 has failed to prove that there was a change of ownership of the vessel in its favour on the date of arrest i.e. on 2.5.2000. This being the case, we set aside the judgment of the High Court and restore the decree of the trial court which reads as under:-

> "In the result, the suit succeeds. There would be a decree as against the vessel M.V. Nikolaos-S of US$ 94,611.25 equivalent to Rs.42,57,500.00 in Indian currency. The plaintiff would be entitled to recover the said sum from the cash security furnished to the Registrar, High Court, Original Side together with accrued interest thereon. The Registrar, Original Side, High Court, however, is entitled to deduct necessary commission applicable thereto."

58. The appeal is, accordingly, allowed in the aforesaid terms.

……J.
(R.F. Nariman)

……J.
(Sanjay Kishan Kaul)

New Delhi;
September 14, 2017.